Supreme Court, U. S.
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77-79

No.

In the Supreme Court of the United States

OCTOBER TERM, 1977

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER
v.
CHILDREN'S HOSPITAL OF PITTSBURGH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WADE H. McCREE, Jr.,
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

CHILDREN'S HOSPITAL OF PITTSBURGH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. C, *infra,* pp. 15A–20A) is not officially reported. The decision of the district court (App. B, *infra,* pp. 1A–13A is reported at 415 F. Supp. 1345.

JURISDICTION

The Judgment of the court of appeals (App. D, *infra,* pp. 19A–20A) was entered on May 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether denial of the use of earned accrued sick leave for female employees' pregnancy-related disabilities violates Title VII of the Civil Rights Act of 1964.

STATUTE INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U.S.C. (and Supp. V) 2000e–2(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; * * *.

STATEMENT

On May 22, 1975, the Equal Employment Opportunity Commission initiated this action in the Western District of Pennsylvania alleging that the Children's Hospital of Pittsburgh discriminated against its female employees on the basis of sex by maintaining discriminatory maternity leave policies.[1] This action resulted from a charge filed with the Commission on May 1, 1973, by Harriet Baum, a former hospital employee, alleging that the Hospital was violating Title VII by not paying Baum and other similarly situated female employees their accumulated sick leave for childbirth and the period prior and following childbirth during which they were medically unable to work.

[1] The facts are set forth in detail in the opinion of the district court (App. A, *infra*, pp. 1A–11A).

Ms. Baum, who had worked at the Hospital as a child development specialist since August 1968, had requested a five-month pregnancy-related leave to commence after she had exhausted her sick leave and vacation time. She was informed, however, that the Hospital did not pay sick leave for pregnancy-related disability.

Ms. Baum worked until July 20, 1973, four days before the birth of her child, at which time she had accrued 20.75 days of sick leave and 30 days of vacation time. She was paid for her vacation time, but not for her accumulated sick leave.

The district court ruled that "any sick leave policy which treats pregnant women differently than employees with other sicknesses or disabilities is sex discrimination in violation of Title VII, since pregnancy is only common to women" (App. A, *infra*, pp. 5A–6A). Finding that there was no legitimate nondiscriminatory reason for prohibiting female employees from using their accumulated sick leave during a pregnancy-related disability, and that Ms. Baum incurred a temporary disability after the birth of her child, the court ruled that she was entitled to have her accumulated sick leave applied prior to the commencement of her leave of absence without pay. The court awarded her $861.87—the value of her accumulated sick leave

at the time she left her employment—and interest from the date of the violation and enjoined the Hospital "from denying any female employee from using accumulated sick days for any pregnancy related or childbirth disability upon proof and application of same" (App. B, *infra*, p. 13A).

The court of appeals, in a *per curiam* opinion, reversed on the authority of *General Electric Co.* v. *Gilbert*, 429 U.S. 125.

ARGUMENT

The question presented is currently before this Court in two other cases, *Satty* v. *Nashville Gas Co.*, 522 F. 2d 850 (C.A. 6), certiorari granted, No. 75–536, January 25, 1977, and *Berg* v. *Richmond Unified School District*, 528 F. 2d 1208 (C.A. 9), certiorari granted, No. 75–1069, January 25, 1977. As the respondent in No. 75–1069 argues, the decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125, holding that the exclusion of a pregnancy-related disability from a company's disability insurance plan did not violate Title VII, is not controlling as to sick leave, which is an earned benefit from actual employment and which can be used for all other temporary disabilities.

This petition is filed to protect the rights of the charging party and respondent's other employees who may be affected by its sick leave pregnancy policy. Because *Satty* and *Berg* adequately present the question to be resolved here, the Court may wish to hold this case pending its decision in those cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
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ABNER W. SIBAL,
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JULY 1977.

APPENDIX A

In the United States District Court for the Western District of Pennsylvania

Civil Action No. 75–627

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

CHILDREN'S HOSPITAL OF PITTSBURGH, DEFENDANT

OPINION

WALLACE S. GOURLEY, *Senior Judge:*

This is a civil rights proceeding filed by the plaintiff, Equal Employment Opportunity Commission, against the defendant, Children's Hospital of Pittsburgh, in behalf of Harriet Baum and all other similarly situated female employees of the defendant hospital for alleged violations of the Civil Rights Act, more particularly, Sections 703(a) and 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000(e) et seq. The court has held a full and complete trial in this proceeding and afforded counsel every opportunity to present any and all evidence, oral or documentary in nature, to support their respective positions.

The facts may be briefly stated. Harriet Baum, a female, was first employed by the defendant, Children's Hospital, as a growth and developmental spe-

cialist in its Developmental Clinic, on August 7, 1968. Throughout her employment with the Children's Hospital, Harriet Baum worked thirty hours per week and was granted vacation pay and sick pay in amounts equal to three quarters to those granted to full-time employees.

When Mrs. Baum learned of her pregnancy in January of 1973, she immediately notified her supervisor, Dr. Grace Gregg, of her condition and communicated her desire to return to work following a leave of absence. Mrs. Baum also sought and requested of defendant to have her unpaid leave of absence begin at the end of her accumulated sick days and vacation days. Suffice to say, Mrs. Baum was subsequently informed that her leave of absence was approved; however, her request to have her accumulated sick days used up prior to the beginning of her leave of absence was denied as being contrary to hospital policy. Thereafter, on May 10, 1973, Harriet Baum filed with the Equal Employment Opportunity Commission a charge against the defendant alleging discrimination through its denial to permit her to use the accumulated sick leave for a maternity related disability.

Mrs. Baum remained in the defendant's employ until July 20, 1973, just four days prior to the birth of her daughter on July 24, 1973. Since Mrs. Baum did not begin her maternity leave until August 21, 1973, at the conclusion of her vacation days, she was not scheduled to return to work until November 30, 1973. Accordingly, Mrs. Baum contacted the defendant in the early part of November, 1973, indicating that she was willing and ready to return to work at the conclusion of her maternity leave which was to have ended on November 30, 1973. However, on November 23, 1973, Mrs. Baum received a letter from

defendant notifying her that due to economic cuts in the hospital's budget, her position as a growth and developmental specialist had been eliminated and that her services at the hospital were no longer required. This notice and action by the defendant prompted Mrs. Baum to file a second charge with the Equal Employment Opportunity Commission on November 26, 1973, alleging that her discharge was due to the previous charge filed against the defendant with the Equal Employment Opportunity Commission.

It is the plaintiff's contention that the defendant hospital's policy of prohibiting female employees to use their accumulated sick leave for pregnancy or child-birth related disabilities discriminated against women employees in violation of Title VII.

Defendant, on the other hand, asserts that this policy is not in violation of Title VII in that sick leave is not a part of wages or salary and that said "sick leave policy" is administered and applied upon the same terms and conditions to all employees, male or female, pregnant or not. More particularly, that no employee is permitted to schedule sick days prior to the actual date of illness and that sick days can only be applied when an employee is scheduled to work.[1]

The court is satisfied after a full and complete trial and after considering the briefs and arguments of

---

[1] Defendant at the outset seeks to dismiss part of plaintiff's claim on the basis that defendant was not served with the notice of charge within twenty days as set forth in Section 706(b) of Title VII. The court does not believe in the instant proceeding that the defendant was prejudiced in anyway whatsoever and does not believe that procedural niceties should be able to impede a Title VII claimant from obtaining a judicial hearing on the merits. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Wetzel* v. *Liberty Mutual Insurance Co.*, 95 Supreme Court 1989; 511 F. 2d 199 (1975).

counsel that the defendant's sick leave policy which prohibited Harriet Baum from using her accumulated sick leave prior to commencing her leave of absence was discriminatory and in violation of Title VII. The principal aim of Title VII is to protect employees from any form of disparate treatment because of, inter alia, sex, absent a compelling and founded reason for such disparity. Civil Rights Act of 1964, as amended, § 701 et seq.; 42 U.S.C.A. § 2000(e) et seq.

The law with respect to rights of the pregnant employee is becoming most firm and definite and consistent with the teachings of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the court has accorded great deference to the Commission's guidelines as providing the proper interpretation of Title VII.

> "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." Employment Policies Relating to Pregnancy and Childbirth, 29 C.F.R. § 1604.10(b) (1972).

The United States Court of Appeals for the Third Circuit, in *Liberty Mutual Insurance Company* v. *Wetzel,* 95 Supreme Court 1989; 511 F. 2d 199 (3rd

Cir. 1975) (vacated and remanded on other grounds), affirmed the District Court's decision on the merits in which it was found that the insurance benefits and maternity leave regulations of the employer, Liberty Mutual, discriminated against women in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000(e) et seq. The employer, Liberty Mutual, had excluded maternity benefits from its income protection plan and the court viewed this type of practice as treating persons in a disparate manner. The court went on to state:

> "* * * We believe that pregnancy should be treated as any other temporary disability. Employers offer disability insurance plans to their employees to alleviate the economic burdens caused by the loss of income and the incurrence of medical expenses that arise from the inability to work.
>
> "A woman, disabled by pregnancy, has much in common with a person disabled by a temporary illness. They both suffer a loss of income because of absence from work; they both incur medical expenses; and the pregnant woman will probably have hospital expenses while the other person may have none, choosing to convalesce at home.
>
> "Thus pregnancy is no different than any other temporary disability under an income protection plan offered to help employees through the financially difficult times caused by illness."

In light of the expressions set forth in *Wetzel,* supra., the court is convinced that logic and justice require the conclusion that any sick leave policy which treats pregnant women differently than employees with other sicknesses or disabilities is sex discrimination in violation of Title VII, since pregnancy is only

common to women.[2] The mere fact that defendant applied its sick leave policy equally to male, female, pregnant, nonpregnant employees is of no consequence if in the administration of said policy a protected class of employees is affected in a disparate manner. *Griggs* v. *Duke Power Co.*, supra., *Wetzel,* supra. Pregnancy and childbirth, which is common only to women, for all practical intents and purposes becomes a temporary disability at some point in time and it is just not practical or realistic to treat said disability differently than any other sickness or disability. Moreover, the court in reviewing the record could find no basis in which to conclude that there was a legitimate nondiscriminatory reason for prohibiting female employees from using their accumulated sick leave during a pregnancy related disability.

The court is satisfied that in the instant proceeding Mrs. Baum was in fact laboring under a temporary disability after the birth of her child and that she was entitled to have her accumulated sick leave used up prior to the commencing of her maternity leave of absence.[3] See also: *Zichy* v. *City of Philadelphia,* 9

[2] The defendant seems to feel that the United States Supreme Court decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) is dispositive of the issue in this proceeding, however, the United States Court of Appeals for the Third Circuit in *Wetzel*, supra., has already reviewed the application of *Aiello* to Title VII cases involving unlawful sex discrimination relating to pregnancy disability and found it not to be controlling. See also: *Satty* v. *Nashville Gas Co.*, 522 F.2d 850 (6th Cir., 1975); *Holthaus* v. *Compton and Sons*, 514 F.2d 651 (8th Cir. 1975); *Gilbert* v. *General Electric Co.*, 519 F.2d 661 (4th Cir. 1975); *Communications Workers of America* v. *American Telephone and Telegraph Company*, 513 F.2d 1024 (2d Cir. 1974).

[3] At the time Harriet Baum went on maternity leave she had accumulated 20.75 or 166 hours of sick leave and her salary was 5.19 per hour or $155.70 per thirty hour week of employment.

E.P.D. ¶ 10211 (E.D. Pa. 1975), where the court held that the denial of sick leave to the employee disabled because of pregnancy or childbirth institutes a different treatment of that employee's needs than those of the employee otherwise disabled but without a rational basis for such distinction.[4] Citing *Wetzel,* supra., the court held:

> "While Wetzel dealt with an income protection plan, we believe the same reasoning applies readily to a sick leave plan. Such plans are instituted to alleviate the hardship which would otherwise befall an employee temporarily physically disabled from working. The employee disabled from pregnancy or childbirth has just as much need for such protection as the employee disabled because of strictly defined illness or injury. Denial of sick leave to the employee disabled because of pregnancy or childbirth thus constitutes different treatment of that employee's needs than those of the employee otherwise disabled, but without rational basis for such distinction.
>
> "Indeed, we would note that an employee stands to lose far more by not having use of a sick leave plan like that involved here than an income protection plan like that involved in *Wetzel.* Whereas the income protection plan preserves only a portion of the employee's pay, the absent employee under the city's sick leave plan here continues not only to receive his full salary, but also to accrue future sick leave as well as time for pension, vacation, promotional, and anniversary date purposes, and other fringe benefits. If the 'illness/non-illness' rationale cannot justify the difference in treatment involved in the income protection plan in *Wetzel,* even less can it justify the substan-

[4] For similar holdings in other circuits see: *Satty* v. *Nashville Gas Co.*, 522 F. 2d 850 (6th Cir. 1975); *Berg* v. *Richmond Unified School District*, 528 F. 2d 1208 (9th Cir. 1975).

tially greater difference in treatment which the sick leave plan here in issue involves."

The plaintiff also seeks relief for all other similarly situated female employees of defendant who were pregnant between July 10, 1971 and the present. However, the only evidence introduced by plaintiff to support this claim, consisted of a stipulation that the personnel records of those individuals listed contained a reference to either maternity or pregnancy as the reason for beginning their leave of absence or terminating their employment and a list of those individuals alleged to be in the same posture as Harriet Baum. This list contained the following information relative to their claim: Pertinent Date of Hire; Date of Termination or Commencement of Leave of Absence; Hourly Salary at Date of Termination or Commencement of Leave of Absence; Accumulated Unused Sick Days (the Day Represents 8 hours) at Date of Termination or Commencement of Leave of Absence; and Date Returned to Work.

For reasons which will now be discussed, the court is satisfied that the granting of defendant's Motion to Dismiss as to all claims against defendant other than those presented by Harriet Baum was proper.

Pregnancy, in and of itself, is not a disability. To require the defendant to pay the full amount of accumulated sick leave to each pregnant employee who terminated her employment or who went on a leave of absence without more would be most unjust. Sick leave benefits only accrue where the individual is laboring under some sickness or disability.[5] Un-

[5] The only exception, which is not applicable in this instant, is where an employee may be paid sick days from accumulated sick time on a physicians appointment even if not actually sick at that time if said employee had more than sixty accumulated sick days.

questionably, a pregnant woman, at some point in time, will suffer some temporary disability as a result of her pregnancy, thereby, entitling her to the right to have her sick leave benefits while she remains under that disability. However, the court is not permitted to speculate as to when this condition will occur or how long said disability will last. The case of every woman is different and, therefore, before a woman is entitled to have the benefit of the accumulated sick leave applied to a pregnancy related disability there must be some evidence as to when and how long the individual actually labored under said disability.

Very simply, the court is not sufficiently informed as to whether any of the individuals listed were in fact sick or disabled and if so, when and for how long. In view thereof, the court is of the considered opinion that the plaintiff has failed to establish that those employees listed were in fact similarly situated to Harriet Baum.

Finally, the court can find no merit to plaintiff's contention that Harriet Baum was discharged from her employment in retaliation for her filing charges for discrimination with the Equal Employment Opportunity Commission.[6] The record reflects that Mrs. Baum's leave of absence was to have expired on November 30, 1973 and that on November 23, 1973, she received a phone call from defendant advising her that her position at the clinic had been eliminated because of a cut in monies which the hospital was to have received from the Allegheny County Mental Health/Mental Retardation Program to operate the Developmental Clinic. Even after a full and fair op-

[6] Section 704(a) of Title VII, 42 U.S.C.A. § 2000(e)-3(a) makes it unlawful to discharge an employee because of his opposition to practices made unlawful by the Act.

portunity had been afforded to the plaintiff, the court is unpersuaded that Mrs. Baum's termination by defendant was in retaliation for her voicing opposition to the hospital's sick pay policies and the filing of a charge with the Equal Employment Opportunity Commission.

The court is satisfied that under all the facts and circumstances defendant's decision to terminate some of its personnel to accommodate for the cut in funding was done for a justifiable economic reason, and the court can find nothing in the record to support plaintiff's contention that defendant's reason for dismissing Mrs. Baum was pretextual. Although the record reflects that the defendant hospital did not experience as great a cut in funding as it had expected, this fact was not known to the defendant at the time the positions were eliminated in the Growth and Developmental Clinic. Defendant hospital terminated Mrs. Baum's position on the good faith and belief that their funding had been reduced and it was not until sometime subsequent to her termination that defendant was informed that part of their funding had been restored. Very simply, the court is convinced that after a most careful review of the record, that there is no basis upon which the court can conclude that the termination of Mrs. Baum was the result of retaliation on the part of the defendant. On the contrary, the record reflects that the sole basis for defendant's actions was founded on economic considerations.

Accordingly, the court can find no basis for the awarding of any damages or back pay since Mrs. Baum's termination was not the result of retaliation on the part of defendant.

In view thereof, Harriet Baum is entitled to receive payment for her accumulated sick days as computed below:

166 hours (accumulated sick days in hours for 1973)

×

5.109 (rate of pay per hour in 1973) = $861.87

Findings of fact and conclusions of law have not been separately stated but are included in the body of the foregoing opinion as specifically authorized by Rule 52(a) of the Federal Rules of Civil Procedure.

An appropriate order is entered.

ORDER

AND NOW, this 30th day of June, 1976, judgment is hereby entered in favor of Harriet Baum only and against the defendant, Children's Hospital of Pittsburgh, for payment of accumulated sick days in the amount of $861.87 with interest at the rate of 6% from the date she officially began her leave of absence.

IT IS FURTHER ORDERED AND DECREED that judgment is hereby entered in favor of the defendant, Children's Hospital of Pittsburgh, and against the plaintiff, Equal Employment Opportunity Commission, for any and all claims presented in behalf of those persons other than Mrs. Harriet Baum.

WALLACE S. GOURLEY,
Senior District Judge.

APPENDIX B

In the United States District Court for the
Western District of Pennsylvania

Civil Action No. 75–627

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

CHILDREN'S HOSPITAL OF PITTSBURGH, DEFENDANT

SUPPLEMENTAL ORDER

AND NOW, this 1st day of July, 1976, the court, through an apparent oversight, failed and neglected to refer in its order of June 30, 1976 to make any reference to plaintiff's request for injunctive relief.

IT IS FURTHER ORDERED AND DECREED that Children's Hospital, its officers, agents, employees, successors, assigns and all persons in active concert or participation with it, are hereby permanently enjoined from denying any female employee from using accumulated sick days for any pregnancy related or childbirth disability upon proof and application of same.

WALLACE S. GOURLEY,
Senior District Judge.

APPENDIX C

United States Court of Appeals For the Third Circuit

Nos. 76-2321 and 76-2322

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

CHILDREN'S HOSPITAL OF PITTSBURGH

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT IN NO. 76-2321

CHILDREN'S HOSPITAL OF PITTSBURGH,
APPELLANT IN NO. 76-2322

(D.C. CIVIL ACTION NO. 75-627)

On Appeal From the United States District Court for the Western District of Pennsylvania

Submitted Under Third Circuit Rule 12(6)
May 3, 1977

Before GIBBONS AND HUNTER, *Circuit Judges,* and LAYTON,* *District Judge*

*CALEB R. LAYTON, 3rd, United States District Judge for the District of Delaware, sitting by designation.

Abner W. Sibal, General Counsel.

Joseph T. Eddins, Associate General Counsel.

Beatrice Rosenberg, Assistant General Counsel.

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Attorneys for Children's Hospital of Pittsburgh.

PER CURIAM

Children's Hospital of Pittsburgh (the "Hospital") appeals from an order granting class injunction relief and money damages to an individual victim of alleged sex discrimination in the denial of sick leave for pregnancy-related disabilities. The Equal Employment Opportunity Commission (the "EEOC") appeals from the portion of that order denying monetary relief to the class. The suit by the EEOC charges that the Hospital's policy of prohibiting female employees to use their accumulated sick leave for pregnancy-related disabilities violates Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) et seq. The district court agreed. However, after the EEOC filed its initial appellate brief the Supreme Court decided *General Electric Company* v. *Gilbert,* — U.S. — (1976), 45 U.S.L.W. 4031 (U.S. Dec. 7, 1976), holding that the exclusion of pregnancy-related disabilities from a disability plan does not

violate Title VII. That decision is controlling. It requires the reversal of the district court's judgment granting class injunctive relief and money damages to the charging party, and the affirmance of the denial of monetary relief to the class.

After the decision in *Gilbert* and before the Hospital's brief was due, its attorney called the case to the EEOC's attention and urged that the appeal be disposed of by a mutual agreement which would dissolve the injunction and terminate all damage claims. The EEOC elected to go forward with the appeal, necessitating the expenditure of additional time and effort on the part of the Hospital's attorney. In a reply brief the EEOC attempts to distinguish *Gilbert;* a distinction we find unpersuasive. The Hospital urges that, in light of *Gilbert,* the EEOC's refusal to discontinue this appeal was vexatious, and accordingly seeks an award of attorney's fees for time and effort expended since the *Gilbert* decision was announced.

In *United States Steel Corporation* v. *United States* 519 F.24 359 (3d Cir. 1975), we held that attorney's fees could be awarded against the EEOC under § 706(k) of Title VII,[1] at least in cases where a proceeding was maintained in bad faith. We cited with approval the holding of the Ninth Circuit in *Van Hoomissen* v. *Xerox Corp.,* 503 F.2d 1131 (9th Cir. 1974), approving such awards in cases of vexatious appeals. But although we have found the EEOC's effort to distinguish *Gilbert* to be unpersuasive, we cannot say that the effort was made vexatiously or in bad faith. Certainly there are factual differences between the benefit plan considered in *Gilbert* and that of the Hospital. In pointing out those differences the EEOC did no more than might be expected of a con-

[1] 42 U.S.C. § 2000e–5(k).

scientious litigant charged with the duty of advancing the policies of Title VII. Thus we will deny the Hospital's fee application.

The judgment of the district court will be reversed insofar as it awards class injunctive relief and damages to the charging party, and affirmed insofar as it denies monetary relief to the class of female employees. Costs taxed in favor of Children's Hospital of Pittsburgh.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX D

United States Court of Appeals for the Third Circuit

Nos. 76-2321/76-2322

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT IN NO. 76-2321

v.

CHILDREN'S HOSPITAL OF PITTSBURGH,
APPELLANT IN NO. 76-2322

(D.C. CIVIL ACTION NO. 75-627)

On Appeal From the United States District Court for the Western District of Pennsylvania

Present: GIBBONS and HUNTER, *Circuit Judges* and LAYTON, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on May 3, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 30, 1976 as amended July 1, 1976 be, and the same is hereby reversed insofar as it awards class injunctive relief and damages to the charging party, and affirmed insofar as it denies monetary relief to the class of female employees.

Costs taxed in favor of Children's Hospital of Pittsburgh.

Attest:

[s] THOMAS F. QUINN,
Clerk.

MAY 19, 1977

*Caleb R. Layton, 3rd, United States District Judge for the District of Delaware, sitting by designation.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-79

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

CHILDREN'S HOSPITAL OF PITTSBURGH,

Respondent.

On A Petition For Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-79

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

CHILDREN'S HOSPITAL OF PITTSBURGH,

Respondent.

On A Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Children's Hospital of Pittsburgh (hereinafter "the Hospital"), opposes the Petition for Writ of Certiorari filed by the Equal Employment Opportunity Commission (hereinafter "EEOC") for the reasons set forth herein.

OPINIONS BELOW

The opinion and orders of the District Court (App. A and B of Petition) are reported at 415 F. Supp. 1345. The opinion of the Court of Appeals for the Third Circuit (App. C of Petition) is reported at 556 F.2d 222.

JURISDICTION AND STATUTE INVOLVED

The jurisdictional requisites and statute involved are adequately set forth in the Petition.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does Title VII of the Civil Rights Act of 1964 require an employer to pay sick days to an employee on days she requested not to be scheduled to work due to pregnancy, even though no other male or female employees may be paid for sick days on days they are sick but not scheduled to work, regardless of the type of illness?

2. Was the Court of Appeals correct in holding "unpersuasive" the EEOC's argument that additional sick days could be paid by the Hospital from its operating fund without additional cost?

COUNTERSTATEMENT OF THE CASE

This litigation concerns Children's Hospital of Pittsburgh's paid sick leave policy, not its unpaid leave of absence policy.[1] This paid sick leave policy governs situations in which an employee may be paid when absent from scheduled work due to illness.

Under this policy, an employee is eligible for payment *only* if the employee was scheduled to work on the day of the illness.[2] If the employee is sick on a scheduled work day and has not already exceeded his or her allowance of sick days, the employee is eligible for payment, without regard to the employee's sex or reason for sickness, including pregnancy. (R. 102 l. 6-9, 107, 145 l. 1-4). No employee, however, is eligible for payment on a day he or she is not scheduled to work. (R. 103, 104, 110, 111, 147). This simple eligibility test—whether an employee is scheduled to work or not—is a sensible one in the hospital field since any other rules would cause confusion due to the complicated scheduling systems required and used because 24-hour medical care must be provided.

In this action, the EEOC has urged that pregnant employees, unlike men and women employees with any

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1. The Hospital's unpaid leave of absence policy, which allows a pregnant employee to establish her own last day of work and her own return date on the same basis as employees on leaves of absence for other reasons, is not at issue in this case. The EEOC has not contended that the Hospital's unpaid leave of absence policy is discriminatory.

2. (R. 99, 103 l. 2-4, 104, 110 l. 17-24, 111 l. 13-14, 118-19, 136 l. 15-20). References in this form are to the Joint Appendix used in the Court of Appeals.

other illnesses, must be paid for sick days on days they request not to be scheduled to work.

Harriet Baum, the charging party and the only employee whose claim is still at issue in this case, had worked at the Hospital 30 hours a week from her hire in August, 1968, until July 20, 1973. At that time she had accrued 166 hours of sick leave and 30 days of vacation time. After July 20 she was not scheduled because she had requested time off due to her pregnancy. In accordance with Hospital policy and her request, she was paid for her unused accumulated vacation time. She was not paid for sick days after her vacation ended on August 21, four weeks after the birth of her child, because she had requested not to be scheduled to return to work until the following November 30.

This was the same rule applied to all other employees and illnesses. The EEOC did not contest the testimony of Miss Wallace, Assistant Administrator of the Hospital since 1968, that no other employee—male or female, pregnant or not—is eligible to be paid for a sick day on a day the employee is not scheduled to work. (R. 103, 104, 110, 111). The EEOC also did not contest Miss Wallace's testimony that many female employees have been paid for sick days caused by pregnancy if they were sick on a scheduled work day.[3] Indeed, Ms. Baum

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3. THE WITNESS [Miss Wallace]: "Under this administration everybody receives the same treatment whether they are pregnant or not, and we have had many pregnant women who have been paid a considerable amount of sick time under this policy." (R. 102).

* * *

Q: [By Mr. Stoner]: "Now, if an employee, whether they are pregnant or not, is actually too sick on a day to work, on the day they are scheduled to work due to any illness, are they entitled to be paid for their accumulated sick days?"

A: [Miss Wallace]: "They are."

Q: "Is that the way that the Hospital sick leave policy is and has been administered as long as you have been in charge of it?"

A: "Yes." (R. 107).

* * *

Q: [By Mr. Stoner]: "Isn't it the case that, in fact, they can, a pregnant person can use a sick day even if they are disabled because of their pregnant condition if they are scheduled to work?"

A: [Miss Wallace]: "Yes, they get sick time all the time. If they are scheduled to work and are ill, we pay sick time to them—well, constantly." (R. 145).

was paid for one-half day of scheduled work she missed during the last month of her pregnancy. (R. 58-59). The EEOC offered no evidence to contest Miss Wallace's testimony that the eligibility rules for payment under the sick days plan had been applied equally to men and women and to all types of disabilities. (R. 102, 107, 118-19, 144-45, 147).

At trial, the EEOC sought $861 for Ms. Baum as the value of her unused sick days, monetary relief for a number of allegedly similarly situated persons, and an injunction. The EEOC contended that the Hospital's refusal to pay an employee who had requested not to be scheduled to work due to pregnancy was an "exclusion for pregnancy related disabilities" and that such purported exclusion violated Title VII, as interpreted by the Third Circuit Court of Appeals in *Liberty Mut. Ins. Co. v. Wetzel,* 511 F.2d 199 (3d Cir. 1975), before it was vacated on other grounds at 424 U.S. 737 (1976).

The District Court granted the Hospital's motion for a directed verdict as to the claims for monetary relief for the persons alleged to be situated similarly to Ms. Baum because, *inter alia,* the EEOC presented no evidence showing whether, or when, any of those persons were actually sick.

The District Court also acknowledged that no employee, male or female, pregnant or not pregnant, had ever been paid sick days on days he or she was not scheduled to work. In what the Hospital submits was clearly error, however, the District Court also concluded that the Hospital's denial of Ms. Baum's demand to be paid for her unused sick days on days she had requested not to be scheduled to work constituted disparate treatment—even though no other employee was treated differently:

> "The mere fact that defendant applied its sick leave policy equally to male, female, pregnant, non-pregnant employees is of no consequence if in the administration of said policy a protected class of employees is affected in a disparate manner." District Court Opinion; Petition for Certiorari at 6A.

Accordingly, the District Court entered an order requiring the Hospital to pay the EEOC $861 for Ms. Baum. It also issued an injunction which, the District Court later acknowledged, requires modification because it does not reflect the facts of the case.[4]

While this case was pending before the Court of Appeals, this Court rejected the EEOC's legal theory that a purported "exclusion for pregnancy-related disabilities" violates Title VII. *General Elec. Co. v. Gilbert,*

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4. See n. 9, *infra.*

429 U.S. 125 (1976). Nevertheless, the EEOC contended to the Court of Appeals that this Court's decision in *Gilbert* is distinguishable for one reason: additional sick days, the EEOC assumed, could be paid to pregnant employees at no additional cost to the Hospital. The Court of Appeals rejected that suggestion:[5]

> "In a reply brief the EEOC attempts to distinguish *Gilbert,* a distinction we find unpersuasive." Court of Appeals Opinion; Petition for Certiorari at 17A.

REASONS FOR DENYING THE WRIT

This case does not warrant review on certiorari because the decision of the Court of Appeals is in accord with this Court's prior decisions, no question of employer-forced involuntary leave of absence for pregnancy is involved, and this case is of limited importance since monetary relief for only one person remains in dispute. Moreover, the Petitioner has suggested no reason justifying review of this case, the Court of Appeals' ruling is correct for reasons in addition to those presented for review, and this case is a poor vehicle for this Court's review because the record does not support the factual assumptions upon which the EEOC's legal theories are based.

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5. The Court of Appeals found it unnecessary to reach the serious factual questions presented on appeal since, even on the EEOC's factual contentions, the EEOC's legal theory of the case had been rejected by this Court's decision in *Gilbert.*

I. THE EEOC's SUGGESTION THAT DISTINCTIONS EXIST BETWEEN BERG AND GILBERT IS NOT A REASON FOR GRANTING CERTIORARI IN THIS CASE.

In its Argument, Petitioner observes that a question in which it is interested is adequately presented to this Court in two other cases. *Satty v. Nashville Gas Co.,* 522 F.2d 850 (6th Cir. 1975), *cert. granted* No. 75-536; *Berg v. Richmond Unified Sch. Dist.,* 528 F.2d 1208 (9th Cir. 1975), *cert. granted* No. 75-1069.

This case, however, is fundamentally different from *Berg* and *Satty* since the Hospital does not force its employees to take an involuntary leave of absence due to pregnancy.

In addition, the EEOC's statement as to why this Court should not follow its decision in *General Elec. Co. v. Gilbert,* 429 U.S. 125 (1976), in the *Berg* case is not a statement of reasons why certiorari should be granted in this case. Instead, it is a mere statement of two ways in which the EEOC might distinguish *Berg*[6] from *Gilbert* and neither distinction is pertinent to this case.

A. The Hospital Does Not Require Employees To Take An Involuntary Leave of Absence For Pregnancy.

Unlike the employees involved in the *Berg* and *Satty* cases, Ms. Baum was not absent from work during her pregnancy due to an employer-forced leave of absence. Under the Hospital's leave of absence policy, which the EEOC has not contended is discriminatory, Ms. Baum was allowed to pick her own last day of work and her own prospective return date. She requested to work at

6. The EEOC does not state why it feels *Satty* might be distinguished from *Gilbert*.

her regular job through July 20, four days before her daughter was born, and she was allowed to do so. She then requested not to be scheduled to work until the return date she selected, November 30. In addition, she was paid vacation pay from the date she chose to stop working through August 21.

Unlike *Berg* and *Satty,* there has been no suggestion in this case that the Hospital forced Ms. Baum to miss working a single day she wished to be scheduled prior to her requested return date.

Furthermore, unlike *Berg* and *Satty,* there has been no suggestion that pregnant employees returning after a leave of absence are treated differently from employees on leaves of absence for any other reason. Similarly, no seniority questions are presented in this case.

Thus, the fact that this Court has granted a writ of certiorari in the *Berg* and *Satty* cases is no reason to do so in this case. In addition, neither distinction which the EEOC sees between *Berg* and *Gilbert* is pertinent to this case.

B. The Court Of Appeals Properly Rejected The EEOC's Claim That Payment Of Additional Sick Days To Unscheduled Pregnant Employees Would Be Cost Free To The Hospital.

The first distinction that the EEOC views as existing between the *Berg* and *Gilbert* cases is that sick leave should be treated differently under Title VII than an insurance plan because the sick leave plan in the *Berg* case "is an earned benefit from actual employment."

Although the EEOC does not directly assert that such a distinction is pertinent to this case, the EEOC suggested only one basis to the Court of Appeals for

distinguishing *Gilbert* from this case: that pregnant employees sick on days they were not scheduled to work could be paid sick days *cost-free to the Hospital.* Since that was the only distinction between *Gilbert* and this case urged by the EEOC to the Court of Appeals, it is proper to conclude that, if the "earned benefit" language in the Petition was intended to be a distinction between *Gilbert* and this case, it must be identical with the EEOC's position below that providing more benefits would be cost free.

There are at least four reasons why the Court of Appeals was correct in finding this proposed distinction "unpersuasive."

First, the suggestion that the abolition of the Hospital's rule that sick days may be paid only if an employee misses a scheduled work day would be cost free to the Hospital is simply wrong. To the contrary, the EEOC states in its Petition that, were this Court to adopt the EEOC's view, the Hospital would be required to pay $861 to Ms. Baum. Furthermore, it is not contested that monies to pay for sick days come from the Hospital's general operating fund, not from insurance or employee contribution. (R. 124). These facts prove conclusively that the Court of Appeals was correct in rejecting the EEOC's suggestion that payment of additional sick days would be cost free to the Hospital.[7]

7. Creation of new situations in which sick days would be payable would not be cost free since sick days now are payable only in certain events. For example, sick days—unlike vacation days—are not payable when an employee terminates his or her employment. (R. 102-03, 111-13). If, as the EEOC contends, the Hospital must now pay sick days to pregnant employees who voluntarily quit because they wish to raise a family, it will obviously not be free of additional cost to the Hospital.

Second, this case is a poor vehicle for testing the theory that all cost free benefits must be paid to pregnant employees under Title VII because the EEOC introduced no evidence at trial to support its position that the Hospital can pay additional sick days without cost. As this Court held in *Gilbert,* the plaintiff in a Title VII action has the burden of proof and this Court will not assume a pivotal fact if the plaintiff introduced no evidence concerning it. 429 U.S. at 137, n. 14.

Third, the EEOC has advanced no legal authority, either in the Court of Appeals or in its Petition to this Court, to support the proposition that Title VII requires that a Hospital must provide supposedly "cost-free" wages and benefits to pregnant employees even if the wages and benefits are given to no other employee. Moreover, if the EEOC's theory is that an "earned" benefit of employment is not provided by the Hospital because it does not pay employees who are sick on days they are not scheduled to work, each employee denied pay—male and female, pregnant or not—might have a cause of action for breach of contract, not for sex discrimination. In any event, the suggestion that the abolition of the Hospital's eligibility rules for payment for sick days will be cost free poses no legal question under Title VII since the statute does not require that "cost free" wages must be paid to pregnant employees if other employees are not so paid. Title VII requires only that those benefits which a Hospital can afford to grant, consistent with its primary obligation to provide quality medical care, are not given discriminatorily.

Finally, if the EEOC was intending to abandon its position that additional benefits would be cost free to the Hospital even though that was the only distinction

of *Gilbert* it urged to the Court of Appeals, the allegation that sick leave is an "earned benefit," using that phrase in everyday parlance, is no distinction at all between this case and *Gilbert*.

The Hospital's paid sick days plan is similar to the plans involved in *Gilbert* and *Geduldig v. Aiello,* 417 U.S. 484 (1974), in that it provides monetary payments to disabled employees who meet the eligibility requirements of the plan.

In this case, as in *Gilbert,* sick leave is given by the employer to attract and keep good quality employees. No benefits are given to persons of the community not earning them by employment with the employer. In each case the benefit is given because and in partial compensation for actual employment.

There is no basis for the EEOC's suggestion that General Electric's employees, any more than the Hospital's employees, did not earn the benefits provided to them by their employer. There simply is no basis for characterizing *Gilbert* as being limited to the supposed fact that the benefits given to General Electric employees under the insurance plan were not earned by those employees.

Even if that were a correct characterization of *Gilbert,* however, the EEOC has not suggested a single fact in the record of this case which shows that the Hospital's employees "earn" their benefits differently than did General Electric's employees.

Thus, the first distinction the EEOC sees between *Berg* and *Gilbert* is no reason for this Court to grant certiorari in this case.

C. The Hospital Does Pay Sick Days For Illness Due To Pregnancy; Employees Not Scheduled To Work Are Not Eligible For Payment, Regardless Of The Type Of Sickness.

The second distinction which the EEOC argues exists between *Berg* and *Gilbert* is that sick leave under the policy of the School District in *Berg* can, it is asserted, "be used for all other temporary disabilities" [other than those relating to pregnancy].

The EEOC does not state that the Court of Appeals erred in failing to recognize such a distinction in this case. Indeed, the EEOC never suggested to the Court of Appeals that it should consider such a distinction and, accordingly, it is not a proper reason for this Court to grant a Writ of Certiorari in this case.

In any event, however, this purported distinction between *Berg* and *Gilbert* is not applicable to this case. The EEOC's implication is that *Gilbert* does not control this case because in *Gilbert* there were other disabilities in addition to those related to pregnancy for which payment was not made. On the other hand, the EEOC would imply that, under the Hospital's plan, all pregnant employees are ineligible for payment of sick days while, in the same circumstances, all other employees with other illnesses are paid. This characterization of the Hospital's plan is not accurate.

The EEOC did not contest the testimony of Miss Wallace, the Hospital's Assistant Administrator, that the policy *does* provide payment to employees who miss work on a scheduled work day due to a pregnancy-related disability. The only pertinent situations under the

Hospital's policy in which there is an exclusion from payment is when any sick employee, male or female, pregnant or not, is not actually scheduled to work. Thus, many employees, of each sex and without regard to whether they are pregnant, are denied payment on days they are sick but not scheduled to work.

There simply is no exclusion from payment which is related to the type of illness suffered by the employee.

Indeed, Ms. Baum was paid for a sick day during the last month of her pregnancy and the fact that many other Hospital employees have been paid for sick days on scheduled work days missed due to pregnancy-related illnesses has not been contested. And certainly the Hospital's exclusions from its sick day policy are as numerous as General Electric's since all employees are excluded from receiving payments whenever they are not scheduled, including, for example, split days off, weekends, holiday, unpaid personal days off, vacation, and all types of leaves of absence.

Thus, the second distinction which the EEOC argues exists between *Berg* and *Gilbert* is not pertinent to the facts of this case because sick days are paid to employees sick due to pregnancy on the same basis as they are paid to employees with other illnesses. Accordingly, the two distinctions which the EEOC suggests exist between *Berg* and *Gilbert* are not reasons that the Court should review this case.

II. EVEN IF THIS COURT REVERSES GILBERT AS THE PETITION WOULD REQUIRE, THE COURT OF APPEALS' HOLDING IN THIS CASE WAS CORRECT.

The Hospital submits that it will require not only a decision in *Berg* and *Satty* favorable to the EEOC but also a reversal of *Gilbert* and *Geduldig v. Aiello,* 417 U.S. 474 (1974), in order to reach the factual and legal questions which would be presented in this Petition.[8]

Even if this Court were to reverse *Gilbert,* however, the Court of Appeals' decision was correct because (1) the EEOC did not show that there was a disparity between the Hospital's treatment of Harriet Baum and even one other employee, let alone any gender-based difference and (2) there is nothing in the record to suggest that the Hospital intended to discriminate.

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8. This Court stated, 417 U.S. at 496-97, n. 20, and it reiterated in *Gilbert,* 429 U.S. at 135:

> "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups —pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."

Under the Hospital's program, sick employees are divided into two groups—employees who are scheduled to work and thus are eligible to be paid, and employees who are not scheduled to work and are, therefore, not eligible to be paid. The EEOC would take one sub-group of the ineligible employees—a portion, not even all persons of one sex—that is, those employees who are pregnant, and provide that only they may be paid when not scheduled to work. It would require more than a reversal of *Gilbert's* holding that this sub-group of one sex may be given lesser benefits to assert that this same sub-group is now entitled to special benefits.

On the first point, the Court of Appeals' decision was correct because the District Court erred as a matter of law in holding that discrimination existed if a pregnant employee was denied a request for sick days without comparing that denial to the rules applied to other employees. Indeed, the District Court agreed that there was no other employee who had ever been treated differently than Ms. Baum when it held:

> "The mere fact that defendant applied its sick leave policy equally to male, female, pregnant, nonpregnant employees is of no consequence if in the administration of said policy a protected class of employees is affected in a disparate manner." Petition at 6A.

The EEOC, however, did not introduce evidence of a single Hospital employee to whom the eligibility rules were applied differently than they were to Ms. Baum and the record shows that, under these sexually-neutral rules, many employees—including Ms. Baum—were paid for scheduled work days they missed due to a pregnancy-related illness.

Thus, even if the Court were to reverse *Gilbert,* the Court of Appeals' decision was correct since there was no sex-related difference in treatment.

Indeed, in a bond hearing in the District Court following the appeal, the trial judge acknowledged that he had misunderstood the Hospital's policy when he issued the injunction and would have changed it if it were before him again.[9] For this reason, too, the Court of Ap-

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9. MR. STONER: "[The injunction] said, 'from denying any female employee from using accumulated sick days for any pregnancy-related or child-

peals' order was correct and this Court should not grant the writ.

In addition, the Court of Appeals was correct because the EEOC introduced no evidence to show that the

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> birth disability upon proof and application of same' —without adding the phrase, 'on the same terms and conditions as it does for all other employees.' If that—"
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> THE COURT: "Well, that was certainly my intention." (R. 229).
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> * * *
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> THE COURT: "A pregnant woman can't be given priority over other people who are sick, sore, lame or disabled." (R. 238).
>
> * * *
>
> THE COURT: "I didn't intend that a pregnant woman would have any more rights than anyone else. I said she is entitled to the same rights that any other employee of the Hospital has." (R. 239).
>
> * * *
>
> MR. STONER: "Now, it appears that [the injunction] gives female employees a superior right over that given to male and non-pregnant employees because there is no reference to the same terms and conditions as apply to men and non-pregnant employees."
>
> THE COURT: "If I had authority to do it, I would modify that injunction. All I can do is say it orally. I meant by that phrase and by that sentence that assuming that any other employee of the Hospital would be absent from their work regardless of why they were absent, man or woman, and they had accumulated sick leave, they were all to be treated the same and a woman that is pregnant and absent does not have any greater right or any lesser rights than all the other employees. That was my intention." (R. 242-43).

sick days plan was adopted or administered with the intent to discriminate.[10] Thus, the Court of Appeals was correct for reasons other than those suggested by the Petition.

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10. In *Gilbert,* this Court indicated that the standards of discrimination and the burden of proof in Title VII cases are the same as the standards applied under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. 429 U.S. at 145. This Court continued its discussion of the role of "intent" in discrimination cases in *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977). In *Arlington Heights,* this Court held, "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U.S. at 265. Since that same standard is pertinent to a Title VII case, as the Court held in *Gilbert,* the EEOC's attempt to argue that the Hospital's plan is a "pretext" for discrimination must fail because the EEOC did not attempt to introduce any evidence to show that the Hospital had a discriminatory intent when it adopted the policy. As this Court held in *Arlington Heights,* the EEOC "simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the [Hospital's] decision." 429 U.S. at 270.

III. THIS CASE IS NOT AN IMPORTANT ONE FOR THIS COURT'S REVIEW SINCE ONLY ONE PERSON'S CLAIM IS IN CONTROVERSY AND A DECISION WOULD PROVIDE LITTLE GUIDANCE FOR OTHER LITIGANTS.

This case is not an important one requiring this Court's review because the only monetary claim which would be affected is the EEOC's claim for $861 for Ms. Baum. The additional monetary relief the EEOC originally sought for the persons it alleged were situated similarly to Ms. Baum was denied by the District Court by directed verdict because the EEOC had failed to offer any evidence on, among other things, whether and when each person was allegedly disabled while not scheduled for work. The EEOC has conceded that it did not establish liability as to those persons[11] and no question as to the propriety of the District Court's grant of the directed verdict is preserved by the EEOC in its Petition. The small and limited monetary claim remaining is clearly not appropriate for this Court's review.

Furthermore, this case has little significance for other litigants unless this Court is prepared to hold (1) that Title VII deems sick days paid by an employer from its operating funds to be cost free to the employer and (2) that Title VII requires such cost free wages to be paid to pregnant employees on days they request not to be scheduled to work, even though other sick employees who are not scheduled are not eligible to be paid.

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11. Brief for the Equal Employment Opportunity Commission [in the Court of Appeals] at 16, 1.5-9.

CONCLUSION

For all the reasons set forth herein, Respondent, Children's Hospital of Pittsburgh, respectfully submits that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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